UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

ROBERT L. PASCO,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.: 5:11-cv-00087
v.	)	
	)	
HANK ZIMMERMAN, et al.	)	
	)	
Defendants.	)	

DEFENDANT MOORE'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

COMES NOW the defendant, JAMES DALLAS MOORE ("Moore"), by counsel, and in response to the plaintiff's opposition to Moore's motion to dismiss the suit pursuant to Fed. R. Civ. 12(b)(6) states as follows:

I. The Fourth Circuit Court of Appeals' decision in *Hughes* – not *Rossignol* – controls this case.

The plaintiff relies heavily on *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir.), *cert. denied*, 540 U.S. 822 (2003), to support his argument that Moore's alleged conduct was not "merely private" but instead under the color of state law. Opp. at 6. This reliance is misplaced. Not only is *Rossignol* wholly distinguishable from the case at bar, but the Fourth Circuit Court of Appeals has expressly stated that *Rossignol* does not control in cases like the one presently before this court. Rather, this court must look to *Hughes v. Halifax County School Board*, 855 F.2d 183 (4th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989), for guidance, and *Hughes* unequivocally instructs that Moore's alleged actions were not under the "color of state law."

In *Hughes*, two maintenance workers harassed a fellow coworker for "his participation in a grand jury investigation of the school board and thefts suffered by the maintenance department in

particular." *Id.* at 184. The workers went as far as to carry out a mock lynching of the plaintiff– "on county land, with a county-owned rope, during work hours." *Id.* at 186. The Fourth Circuit affirmed this court's holding that "county employees [were not] liable under § 1983 for an assault upon a fellow employee . . . , even though the assault occurred during working hours, on county property, for motives related to their employment with the county." *Mentavlos v. Anderson*, 249 F.3d 301, 321 (4th Cir. 2001) (citing *Hughes,* 855 F.2d at 186). Specifically, the employees were not acting under the color of state law because, "unlike in the case of police officers or judges who abuse their state authority while clothed with state power, 'the indicia of state authority just isn't the same'" for mere county employees. *Mentavlos*, 249 F.3d at 321-22 (citing *Hughes*, 855 F.2d at 187).

The facts set forth in *Hughes* are essentially the same as those presented by this case. Here, the plaintiff, a county employee, has sued his coworker for alleged tortious acts. Those acts occurred "during working hours, on county property, for motives [allegedly] related to their employment with the county." *Id.* at 321. There is nothing substantively distinguishable about this case from *Hughes*.

Rossignol, however, is completely different. In *Rossignol,* sheriff's deputies conducted a countywide mass purchase of the plaintiff's newspapers in an attempt to "shield themselves from adverse comment and to stifle public scrutiny of their performance." 316 F.3d at 524. Although the officers were "off duty, wearing plainclothes, and driving their personal cars" when the seizure took place, *id.* at 520, the Fourth Circuit Court of Appeals held that the deputies were, nevertheless, acting "under color of state law," *id.* at 523. The Court found a nexus between the deputies' private acts and official statuses because the "desire to retaliate against the victim grew out of her criticism of the defendant's actions in his official capacity," *id.* at 524; the deputies used the authority of their offices "to ensure that they would not be prosecuted for their election day seizure," *id.* at 525; and the deputies were well known throughout the community as police officers, *id.* at 526– in fact, during

the seizure, one wore his Fraternal Order of the Police sweatshirt and two others carried their service weapons, *id.* at 520.

It was these facts that led the Fourth Circuit to conclude that *Hughes* was simply too different to be relevant to the *Rossignol* case. The Court noted that *Hughes* was "not controlling" because it involved "defendants' spur-of-the-moment harassment of a coworker in the workplace rather than a conspiracy to suppress by prior restraint the distribution of election day political speech." *Id.* at 525 n. 2. What makes *Hughes* not controlling in *Rossignol*, however, makes it absolutely controlling in this case given the aforementioned factual similarities.

The reasons *Rossignol* is inapplicable to *Hughes*– and, in turn, to the facts of this case– do not stop there, however. *Rossignol* is also distinguishable because it involved police officers' acts regarding private citizens, not county employees' acts regarding a coworker (as is the case here). This is a relevant distinction because, for a viable Section 1983 claim, the power at issue must be "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Monroe v. Pape*, 365 U.S. 167, 184 (1961). Who that "authority" is exercised in relation to effects whether it, in fact, exists. Police officers, like judges, have clear authority over civilians granted to them by state law and an identifiable public image which supports that authority, such as a uniform, badge or service weapon. *See Hughes*, 855 F.2d at 187. Thus, their very authority and investment with state power is apparent in the nature of the occupation. Typical county employees like Moore, however, "lack the indicia of state authority" that "police officers or judges" have. *Mentavlos*, 249 F.3d at 321-22. "There is simply no reason to equate [officer vis-a-vis civilian with officer vis-a-vis coworker]." *Givens v. O'Quinn*, 121 F. App'x 984, 989 (4th Cir. 2005) (Luttig, J., concurring).

Further, coworkers rarely have what could be construed as "the authority of state law" as to

each other unless the alleged bad actor is in a supervisory role. *See, e.g., id.*; *Hinks v. Bd. of Educ.*, No. WDQ-09-1672, 2010 U.S. Dist. LEXIS 129005, 16-17 n. 16 (D. Md. Dec. 6, 2010) (comparing *Hughes*, where "coworkers had no authority over plaintiff," to case at issue, where allegations against defendant were sufficient because he "had supervisory authority over [the plaintiff]"); *see also Martinez v. Colon*, 54 F.3d 980, 988 n. 6 (1st Cir. 1995) (had plaintiff "been a civilian rather than a fellow officer, the significance of the defendant's uniform and weapon for purposes of the color-of-law determination might well have been greater. But when the victim is himself a fellow officer and the particular interaction between the two officers is of a distinctly personal nature [i.e., pointing a loaded service weapon at the co-officers genitals and firing], it can generally be assumed that the aggressor's official trappings, without more, will not lead the victim to believe that the aggressor is acting with the imprimatur of the state and, in turn, to forgo exercising his legal rights"). In this case, the plaintiff has not alleged that Moore supervised the plaintiff– in fact, the plaintiff alleges that he, in his role as director of the library, was the one who had authority over Moore. *See, e.g.,* Compl. ¶¶14-16, 18, 21, 22, 31; Opp. at 3, 8. The complaint also lacks any allegation as to how Moore exercised or abused any state-issued authority over the plaintiff in the absence of such supervisory authority.

In light of the foregoing information, the plaintiff's insistence that *Rossignol* is controlling in this case is simply not compelling. *See* Opp. at 7-8. The Fourth Circuit's own decision makes clear that *Rossignol* does not apply to suits between coworkers regarding tortious activity. Rather, it is *Hughes* that controls such cases, and, under *Hughes,* it is not enough that Moore's alleged bad acts occurred "at work and during the regular work-day," were related to Moore's role as technology director, or were motivated by a desire to have the plaintiff's employment with the Shenandoah County Library terminated. Opp. at 7-8. The plaintiff must allege more: the defendant must have

committed the alleged acts "while [he] w[as] purporting to act under the authority vested in [him] by the state" or the acts must have been "made possible because of the privileges of [his] employment." *Hughes,* 855 F.2d at 186-187. The plaintiff has not alleged and cannot allege such facts. When, as the plaintiff claims, Moore allegedly barged into his superior's office, grabbed the hard drives, and physically assaulted the plaintiff, he was not acting within any "authority" granted to him by the state. At best, his acts were a "personal frolic" or "personal pursuit" and do not describe conduct that occurred while "in the course of performing an actual or apparent duty of his office" or conduct that could not have occurred "but for the authority of his office." *Martinez*, 54 F.3d at 986. *See* Mot. at 6.

For these reasons, in particular the Fourth Circuit's decision in *Hughes*, the plaintiff has no remedy under Section 1983 based on the facts alleged. Moore's motion to dismiss Count I for failure to state a claim should be granted.

II. Failure to state a plausible claim in the complaint requires dismissal.

Plaintiff's deficient allegations are not saved– as he suggests, *see* Opp. at 5– by the Rule 12(b)(6) standard of review. Plaintiff argues that the facts alleged in his complaint need only "raise a plausible claim and an expectation that discovery will reveal evidence supporting the elements of the claim." Opp. at 5. While the quote is essentially accurate, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007), Plaintiff ignores the important context in which this legal standard exists. As the Fourth Circuit wrote in *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*,

> The complaint must . . . plead sufficient facts to allow a court, drawing on judicial experience and common sense, to infer more than the mere possibility of misconduct. Without such heft, the plaintiff's claims cannot establish a valid entitlement to relief, as facts that are merely consistent with a defendant's liability, fail to nudge claims across the line from conceivable to plausible.

591 F.3d 250, 256 (4th Cir. 2009) (quotations marks and internal citations omitted). Thus, the hope of what may be revealed in discovery does not reform an initially insufficient pleading into one that can withstand a Rule 12(b)(6) motion to dismiss. The plaintiff must at least allege enough sufficient facts such that the purported bad acts give rise to a claim. *See id.* at 255. Here, the allegations stop short and, because of that, the count must be dismissed.

III. Conclusion

As the Fourth Circuit warned in *Hughes*, allowing an action like this to proceed risks that "any employee of any state who commits a tort has potentially violated § 1983." 855 F.2d at 187. Such a result should not be allowed, especially when the facts are so similar to those in *Hughes*. Accordingly, the defendant, by counsel, respectfully requests that Count I– which claims violations of Plaintiff's constitutional rights pursuant to Section 1983– be dismissed with prejudice. Further, the defendant requests that the state law claims set forth in Counts II, III, IV, V, and VI be dismissed because, without a proper federal claim, there is no compelling reason for the court to retain jurisdiction over the state law counts. For all of the foregoing reasons, and for any additional reasons to be argued at hearing of this matter, defendant James Dallas Moore respectfully requests that this court grant his motion to dismiss.

JAMES DALLAS MOORE

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2012, I electronically filed the foregoing **Reply Memorandum in Support of Motion to Dismiss** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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